

Sep 30, 2018

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MICHAEL C.,

Plaintiff,

vs.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 1:17-cv-03147-MKD

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND DENYING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

ECF Nos. 17, 22

BEFORE THE COURT are the parties' cross-motions for summary judgment. ECF Nos. 17, 22. The parties consented to proceed before a magistrate judge. ECF No. 7. The Court, having reviewed the administrative record and the parties' briefing, is fully informed. For the reasons discussed below, the Court grants Plaintiff's Motion, ECF No. 17, and denies Defendant's Motion, ECF No. 22.

JURISDICTION

The Court has jurisdiction over this case pursuant to 42 U.S.C. § 1383(c)(3).

STANDARD OF REVIEW

A district court’s review of a final decision of the Commissioner of Social Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is limited; the Commissioner’s decision will be disturbed “only if it is not supported by substantial evidence or is based on legal error.” *Hill v. Astrue*, 698 F.3d 1153, 1158 (9th Cir. 2012). “Substantial evidence” means “relevant evidence that a reasonable mind might accept as adequate to support a conclusion.” *Id.* at 1159 (quotation and citation omitted). Stated differently, substantial evidence equates to “more than a mere scintilla[,] but less than a preponderance.” *Id.* (quotation and citation omitted). In determining whether the standard has been satisfied, a reviewing court must consider the entire record as a whole rather than searching for supporting evidence in isolation. *Id.*

In reviewing a denial of benefits, a district court may not substitute its judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001). If the evidence in the record “is susceptible to more than one rational interpretation, [the court] must uphold the ALJ’s findings if they are supported by inferences reasonably drawn from the record.” *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court “may not reverse an

1 ALJ's decision on account of an error that is harmless." *Id.* An error is harmless
2 "where it is inconsequential to the [ALJ's] ultimate nondisability determination."
3 *Id.* at 1115 (quotation and citation omitted). The party appealing the ALJ's
4 decision generally bears the burden of establishing that it was harmed. *Shinseki v.*
5 *Sanders*, 556 U.S. 396, 409-10 (2009).

6 **FIVE-STEP EVALUATION PROCESS**

7 A claimant must satisfy two conditions to be considered "disabled" within
8 the meaning of the Social Security Act. First, the claimant must be "unable to
9 engage in any substantial gainful activity by reason of any medically determinable
10 physical or mental impairment which can be expected to result in death or which
11 has lasted or can be expected to last for a continuous period of not less than twelve
12 months." 42 U.S.C. § 1382c(a)(3)(A). Second, the claimant's impairment must be
13 "of such severity that he is not only unable to do his previous work[,] but cannot,
14 considering his age, education, and work experience, engage in any other kind of
15 substantial gainful work which exists in the national economy." 42 U.S.C. §
16 1382c(a)(3)(B).

17 The Commissioner has established a five-step sequential analysis to
18 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §
19 416.920(a)(4)(i)-(v). At step one, the Commissioner considers the claimant's work
20 activity. 20 C.F.R. § 416.920(a)(4)(i). If the claimant is engaged in "substantial

1 gainful activity,” the Commissioner must find that the claimant is not disabled. 20
2 C.F.R. § 416.920(b).

3 If the claimant is not engaged in substantial gainful activity, the analysis
4 proceeds to step two. At this step, the Commissioner considers the severity of the
5 claimant’s impairment. 20 C.F.R. § 416.920(a)(4)(ii). If the claimant suffers from
6 “any impairment or combination of impairments which significantly limits [his or
7 her] physical or mental ability to do basic work activities,” the analysis proceeds to
8 step three. 20 C.F.R. § 416.920(c). If the claimant’s impairment does not satisfy
9 this severity threshold, however, the Commissioner must find that the claimant is
10 not disabled. 20 C.F.R. § 416.920(c).

11 At step three, the Commissioner compares the claimant’s impairment to
12 severe impairments recognized by the Commissioner to be so severe as to preclude
13 a person from engaging in substantial gainful activity. 20 C.F.R. §
14 416.920(a)(4)(iii). If the impairment is as severe or more severe than one of the
15 enumerated impairments, the Commissioner must find the claimant disabled and
16 award benefits. 20 C.F.R. § 416.920(d).

17 If the severity of the claimant’s impairment does not meet or exceed the
18 severity of the enumerated impairments, the Commissioner must pause to assess
19 the claimant’s “residual functional capacity.” Residual functional capacity (RFC),
20 defined generally as the claimant’s ability to perform physical and mental work

activities on a sustained basis despite his or her limitations, 20 C.F.R. § 416.945(a)(1), is relevant to both the fourth and fifth steps of the analysis.

At step four, the Commissioner considers whether, in view of the claimant's RFC, the claimant is capable of performing work that he or she has performed in the past (past relevant work). 20 C.F.R. § 416.920(a)(4)(iv). If the claimant is capable of performing past relevant work, the Commissioner must find that the claimant is not disabled. 20 C.F.R. § 416.920(f). If the claimant is incapable of performing such work, the analysis proceeds to step five.

At step five, the Commissioner considers whether, in view of the claimant's RFC, the claimant is capable of performing other work in the national economy. 20 C.F.R. § 416.920(a)(4)(v). In making this determination, the Commissioner must also consider vocational factors such as the claimant's age, education and past work experience. 20 C.F.R. § 416.920(a)(4)(v). If the claimant is capable of adjusting to other work, the Commissioner must find that the claimant is not disabled. 20 C.F.R. § 416.920(g)(1). If the claimant is not capable of adjusting to other work, analysis concludes with a finding that the claimant is disabled and is therefore entitled to benefits. 20 C.F.R. § 416.920(g)(1).

The claimant bears the burden of proof at steps one through four above. *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to step five, the burden shifts to the Commissioner to establish that (1) the claimant is

capable of performing other work; and (2) such work “exists in significant numbers in the national economy.” 20 C.F.R. § 416.960(c)(2); *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

ALJ’S FINDINGS

On October 30, 2013, Plaintiff applied for Title XVI supplemental security income benefits alleging a disability onset date of January 1, 2009. Tr. 201-06. The applications were denied initially, Tr. 116-24, and on reconsideration, Tr. 125-30. Plaintiff appeared at a hearing before an administrative law judge (ALJ) on February 12, 2016, Tr. 36-48, and on July 21, 2016, Tr. 49-82. On July 28, 2016, the ALJ denied Plaintiff’s claim. Tr. 20-30.

At step one of the sequential evaluation process, the ALJ found Plaintiff has not engaged in substantial gainful activity since the application filing date, October 30, 2013. Tr. 22. At step two, the ALJ found that Plaintiff has the following severe impairments: cervical degenerative disc disease; coronary artery disease and status post coronary infarction (heart attack); hepatitis C; bipolar disorder II; and social phobia. Tr. 22.

At step three, the ALJ found Plaintiff does not have an impairment or combination of impairments that meets or medically equals the severity of a listed impairment. Tr. 23. The ALJ then concluded that Plaintiff has the RFC to perform light work with the following limitations:

1 He can never climb ladders, ropes or scaffolds. He can occasionally
2 climb ramps and stairs. He can occasionally kneel and crouch. He
3 can occasionally stoop and crawl. He is limited to occasional
4 reaching at overhead height. He is limited to occasional exposure to
5 vibration and pulmonary irritants such as dust, fumes, odors, gases
6 and poor ventilation. He is limited to occasional exposure to
workplace hazards such as proximity to unprotected heights and
moving machinery. He is able to adapt to a predictable work routine
with no more than occasional changes in terms of assigned tasks and
the procedures for accomplishing those tasks. He is limited to
occasional and superficial public interaction.

7 Tr. 25.

8 At step four, the ALJ found Plaintiff has no past relevant work. Tr. 28. At
9 step five, the ALJ found, considering Plaintiff's age, education, work experience,
10 and RFC, there are jobs that exist in significant numbers in the national economy
11 that Plaintiff could perform, such as, cleaner/housekeeper, electrical assembler, and
12 small-products assembler. Tr. 28-29. Therefore, the ALJ concluded Plaintiff was
13 not under a disability, as defined in the Social Security Act, since the filing date of
14 the application, October 30, 2013. Tr. 29-30.

15 On July 3, 2017, the Appeals Council denied review of the ALJ's decision,
16 Tr. 1-5, making the ALJ's decision the Commissioner's final decision for purposes
17 of judicial review. *See* 42 U.S.C. § 1383(c)(3).

1 **ISSUES**

2 Plaintiff seeks judicial review of the Commissioner's final decision denying
3 him supplemental security income benefits under Title XVI of the Social Security
4 Act. Plaintiff raises the following issues for review:

5 1. Whether the ALJ properly incorporated the opined limitations into the
6 RFC; and

7 2. Whether the ALJ properly evaluated Plaintiff's symptom claims.
8 ECF No. 17 at 5, 10, 12.

9 **DISCUSSION**

10 **A. RFC**

11 Plaintiff contends the RFC failed to account for his mental and physical
12 limitations. ECF No.17 at 5, 12.

13 At step four of the sequential evaluation, the ALJ must determine the
14 claimant's RFC. 20 C.F.R. § 416.920(a)(4)(iv). "[T]he ALJ is responsible for
15 translating and incorporating clinical findings into a succinct RFC." *Rounds v.*
16 *Comm'r Soc. Sec. Admin.*, 807 F.3d 996, 1006 (9th Cir. 2015). "[A]n ALJ's
17 assessment of a claimant adequately captures restrictions related to concentration,
18 persistence, or pace where the assessment is consistent with restrictions identified
19 in the medical testimony." *Stubbs-Danielson v. Astrue*, 539 F.3d 1169, 1174 (9th
20 Cir. 2008). To the extent the evidence could be interpreted differently, it is the role

1 of the ALJ to resolve conflicts and ambiguity in the evidence. *Morgan v. Comm'r*
2 *Soc. Sec. Admin.*, 169 F.3d 595, 599-600 (9th Cir. 1999).

3 *1. Mental-Impairment Limitations*

4 a. Patricia Kraft, Ph.D.

5 On May 15, 2014, Dr. Kraft reviewed the medical evidence of record. Tr.
6 100-02 (listing records reviewed). Dr. Kraft diagnosed Plaintiff with affective
7 disorder and anxiety disorder. Tr. 102-03. Dr. Kraft opined that Plaintiff's
8 affective and anxiety disorders would mildly restrict Plaintiff's activities of daily
9 living and moderately restrict his abilities to:

- 10 • maintain attention and concentration for extended periods of time;
- 11 • complete a normal workday and work week without interruptions
- 12 from psychologically based symptoms and to perform at a consistent
- 13 pace without an unreasonable number and length of rest periods;
- 14 • respond appropriately to changes in the work setting; and
- 15 • interact appropriately with the public.

16 Tr. 107-08. As to Plaintiff's sustained concentration, pace, and persistence
17 limitations, Dr. Kraft stated:

18 No significant cognitive limits noted in testing & overall has GED
19 [with reports] of leaving jobs largely related to being bored; some
20 indication of tangential [thought process] on recent [psychological]

1 exam. Overall can complete [simple, repetitive¹ tasks] & most
2 detailed tasks [with occasional] wane in [attention] & concentration
[due to psychological symptoms] of anxiety & depression.

3 Tr. 108 (spelling out abbreviations used in original). As to Plaintiff's adaptation
4 limitations, Dr. Kraft stated, "[due to psychological symptoms Plaintiff] would do
5 best [within] a predicable work environment." *Id.* (spelling out abbreviations used
6 in original).

7 The ALJ gave significant weight to Dr. Kraft's opinion and determined that
8 Plaintiff had moderate difficulties in regard to concentration, persistence, and pace.
9 Tr. 24, 27. In regard to Plaintiff's mental-health limitations, the ALJ's RFC stated:
10 "[Plaintiff] is able to adapt to a predictable work routine with no more than
11 occasional changes in terms of assigned tasks and the procedures for
12 accomplishing those tasks. He is limited to occasional and superficial public
13 interaction." Tr. 25.

14 Plaintiff contends the ALJ failed to fully incorporate three of Dr. Kraft's
15 mental-functional assessments in the RFC—the first three listed above: 1)
16 concentration/attention, 2) workday/workweek pace and persistence, and 3) work-

17 _____
18 ¹ It is unclear whether Dr. Kraft intended "simple, routine tasks" or "simple,
19 repetitive tasks." However, whether Dr. Kraft meant routine or repetitive tasks is
20 immaterial to the outcome of this matter.

1 setting changes/predictable work environment. ECF No. 17 at 6-7 (citing Tr. 27).
2 Addressing the latter first, Plaintiff argues the ALJ failed to incorporate Dr. Kraft's
3 opinion that Plaintiff was moderately limited in his ability to respond appropriately
4 to changes in the work setting, requiring him to have a predictable work
5 environment. ECF No. 17 at 7 (citing Tr. 25). An RFC finding need not be
6 identical to a medical opinion; rather, it must be consistent with the medical
7 opinion. *Turner v. Comm'r of Soc. Sec. Admin.*, 613 F.3d 1217, 1222-23 (9th Cir.
8 2010). Here, the RFC is consistent with Dr. Kraft's opinion in this regard:
9 "[Plaintiff] is able to adapt to a predictable work routine with no more than
10 occasional changes in terms of assigned tasks and the procedures for
11 accomplishing those tasks." Tr. 25. The ALJ sufficiently incorporated Dr. Kraft's
12 opinion about Plaintiff's work-change limitations into the RFC.

13 As to the other functional limitations—concentration/attention and
14 workday/workweek pace and persistence, Dr. Kraft opined that these limitations
15 were due to Plaintiff's anxiety and depression. Tr. 107-08. Because the ALJ gave
16 great weight to Dr. Kraft's opinion, these concentration, pace, and persistence
17 limitations were to be incorporated into the RFC. *See Lester v. Chater*, 81 F.3d
18 821, 830-31 (9th Cir. 1995). The Commissioner argues the ALJ incorporated these
19 limitations into the RFC, as the RFC limits Plaintiff to unskilled work, which the
20

1 Commissioner submits inherently requires little judgment and can be learned in a
2 short period of time. ECF No. 22 at 4.

3 Here, in assessing the medical opinions, the ALJ failed to discuss and
4 explain how the moderate limitations in concentration and workday/workweek
5 pace and persistence were incorporated into the RFC. Tr. 27. It is not apparent to
6 the Court that the ALJ considered and incorporated such limitations. Instead, it
7 appears that the RFC solely addressed Plaintiff's limitations in regard to work
8 routine and public interaction: "He is able to adapt to a predictable work routine
9 with no more than occasional changes in terms of assigned tasks and the
10 procedures for accomplishing those tasks. He is limited to occasional and
11 superficial public interaction." Tr. 25; *see also* Tr. 27. Work-routine adaptability
12 and public interaction are different abilities than concentration and
13 workday/workweek pace and persistence. The ALJ was required to include all of
14 Plaintiff's "functional limitations, both physical and mental" in the hypothetical
15 question posed to the vocational expert." *Flores v. Shalala*, 49 F.3d 562, 570 (9th
16 Cir. 1995). *See also Kasarsky v. Barnhart*, 335 F.3d 539, 543-44 (7th Cir. 2003)
17 ("Employers are entitled to demand that their employees stick with the job, once
18 they have been trained to do it; the length of time it takes someone with borderline
19 intelligence to learn a job is not the same as the ability of that person to perform
20 consistently once trained."); *Calloway v. Berryhill*, No. 2:17-cv-00151-TLF, 2017

1 WL 3700798, at *3 (W.D. Wash. Aug. 25, 2017) (unpublished opinion) (finding
2 the RFC assessment failed to incorporate the psychologist’s opinion that although
3 plaintiff could perform simple routine tasks and more complex tasks, her
4 concentration, persistence, or pace may wax and wane); *Tucker v. Colvin*, No. 14-
5 08146AG(RAO), 2015 WL 7737300, at *2 (C.D. Cal. Nov. 30, 2015) (unpublished
6 opinion) (finding that the ALJ erred by failing to include the plaintiff’s moderate
7 deficiencies of concentration, persistence, or pace in the RFC; plaintiff’s attention-
8 limitation was not covered by the following RFC limitation: “perform no more
9 than simple, repetitive tasks; perform no jobs requiring any contact with the public
10 or more than occasional interactions with co-workers and supervisors”) (citing
11 similar cases). Because the ALJ accepted Dr. Kraft’s opinion that Plaintiff has
12 moderate difficulties with concertation and workday/workweek pace and
13 persistence, the ALJ was required to pose some form of these limitations to the
14 vocational expert. *See Brink v. Comm’r Soc. Sec. Admin*, 343 F.3d App’x 211, *1
15 (9th Cir. 2009) (“The hypothetical question to the vocational expert should have
16 included not only the limitation to ‘simple, repetitive work,’ but also [the
17 claimant’s] moderate limitations in concentration, persistence, or pace.”). Here,
18 because the ALJ failed to explain how these limitations were incorporated into the
19 RFC—and it is not apparent to the Court that these limitations were incorporated
20 into the RFC absent such an explanation, the ALJ erred. *See id.*; *Stubbs-*

1 *Danielson*, 539 F.3d at 1174 (requiring RFC to capture medically supported
2 restrictions related to concentration, persistence, or pace).

3 This error was not harmless. An ALJ's error is harmless where such error is
4 inconsequential to the ultimate non-disability determination. *See Stout v. Comm'r*
5 *of Soc. Sec.*, 454 F.3d 1050, 1055 (9th Cir. 2006); *Burch v. Barnhart*, 400 F.3d
6 676, 679 (9th Cir. 2005) ("A decision of the ALJ will not be reversed for errors
7 that are harmless."). The error was consequential because a worker must be able to
8 maintain sufficient concentration and persist in their work. Specifically, a worker
9 must be able to "maintain concentration and attention for extended periods (the
10 approximately two-hour segments between arrival and first break, lunch, second
11 break, and departure)." Social Security Program Operations Manual System
12 (POMs) DI 25020.010(B)(2). As a result, if Plaintiff is unable to persist at work
13 without workday or workweek interruptions, he may be deemed unemployable, as
14 the vocational expert testified that an employer will not tolerate a person missing
15 more than five days of work per year. Tr. 78. Here, the Court is unable to
16 determine whether an RFC incorporating any additional limitations, combined with
17 Plaintiff's other limitations, would result in the inability to perform any work in the
18 national economy. Therefore, the ALJ's RFC failure is not inconsequential. *Cf.*
19 *Molina*, 674 F.3d at 1115 (finding an error to be harmless if it is "inconsequential
20 to the [ALJ's] ultimate nondisability determination.").

1 Yet, the Commissioner argues any error in incorporating Dr. Kraft's opinion
2 about Plaintiff's concentration and workday/workweek pace and persistence
3 limitations is harmless because Plaintiff was found to be not disabled on the
4 Disability Determination Reconsideration form. ECF No. 22 at 6 (citing Tr. 110).
5 However, the Court is reviewing the ALJ's disability decision and, as discussed
6 above, it was the ALJ's responsibility to determine Plaintiff's RFC and disability
7 status. *See S.S.R. 96-5p* at *2. When assessing Plaintiff's RFC, the ALJ was
8 required to capture all of Plaintiff's limitations related to concentration,
9 persistence, and pace identified in the medical testimony. *See Stubbs-Danielson*,
10 539 F.3d at 1174. By failing to pose a complete hypothetical to the vocational
11 expert and failing to discuss whether Dr. Kraft's opined functional limitations as to
12 Plaintiff's concentration and workday/workweek pace and persistence were
13 incorporated into the RFC, the ALJ committed harmful legal error, requiring
14 remand to the ALJ. *See Brink*, 343 Fed. App'x 211 at *1-2 (remanding to the ALJ
15 to clarify the RFC and hypothetical posed to the vocational expert to determine
16 whether claimant is able to perform gainful employment in the national economy).

17 Because of this harmful legal error, Plaintiff asks for an immediate award of
18 benefits. To do so, the Court must find that the record has been fully developed
19 and further administrative proceedings would not be useful. *Garrison v. Colvin*,
20 759 F.3d 995, 1019-20 (9th Cir. 2014); *Varney v. Sec'y of Health & Human Servs.*,

1 859 F.2d 1396, 1399 (9th Cir. 1988). Where there are outstanding issues that must
2 be resolved before a determination can be made, and it is not clear from the record
3 that the ALJ would be required to find a claimant disabled if all the evidence were
4 properly evaluated, remand is appropriate. *Benecke v. Barnhart*, 379 F.3d 587,
5 595-96 (9th Cir. 2004); *Harman v. Apfel*, 211 F.3d 1172, 1179-80 (9th Cir. 2000).

6 Plaintiff argues that further administrative proceedings are unneeded
7 because, under the Social Security Regulations' definition for the term
8 "occasionally," Dr. Kraft opined that Plaintiff is unable to maintain his
9 concentration for the required two-hour intervals. ECF No. 23 at 2-3. Plaintiff
10 relies on the "occasionally" definition in SSR 96-9p. *Id.* SSR 96-9p defines
11 "occasionally" as "occurring from very little up to one-third of the time, and would
12 generally total no more than about two hours of an eight-hour workday. ECF No.
13 23 at 2 (citing SSR 96-9p). However, this cited rule defines "occasionally" for
14 purposes of determining whether a physical impairment requires the claimant to
15 perform sedentary work. *Id.* There is no indication that Dr. Kraft intended this
16 SSR 96-9p "occasionally" definition to apply to her concentration-limitation
17 opinion. Moreover, contrary to Plaintiff's position, it is not clear to the Court that
18 Dr. Kraft's comments mean that Plaintiff's occasional wax and wane of symptoms
19 would be of sufficient severity to render Plaintiff unable to have sufficient
20 concentration for unskilled work, given Dr. Kraft's other findings.

1 Therefore, “there are outstanding issues that must be resolved” before a
2 disability determination can be made. *Garrison*, 759 F.3d at 1019-20. As a result,
3 an immediate award of benefits is not appropriate. On remand, the ALJ is to
4 reconsider Dr. Kraft’s opinion in light of the entire record, resolve any conflicts,
5 and then translate that evidence and incorporate it into a RFC that adequately
6 captures all of Plaintiff’s restrictions. *See Brink*, 343 Fed. App’x 211, at *1-2.

7 b. Roland Dougherty, Ph.D.

8 At the request of the Social Security Administration, Dr. Dougherty
9 conducted a consultative examination of Plaintiff on December 3, 2013. Tr. 472-
10 78. Dr. Dougherty diagnosed Plaintiff with conditions, including bipolar II mood
11 disorder; depressive phase; social phobia; hypertension; degenerative disc and joint
12 disease; and coronary artery disease. Tr. 477. He opined that Plaintiff could do
13 detailed and complex tasks, accept instructions from supervisors and interact with
14 coworkers and the public, and “should” maintain regular attendance in the
15 workplace with respect to psychiatric disorders, but “may” have difficulty dealing
16 with workplace stress and completing a normal workday/workweek without
17 interruptions from his anxiety and depression/hypomania. Tr. 478.

18 The ALJ assigned varying weight to Dr. Dougherty’s consultative opinion.
19 Tr. 27. First, the ALJ assigned only some weight to Dr. Dougherty’s opinion that
20 Plaintiff can complete detailed and complex tasks, accept instructions from

1 supervisors, and interact with coworkers and the public. *Id.* Second, the ALJ
2 assigned lesser weight to Dr. Dougherty’s opinion that Plaintiff “should be able to
3 maintain regular attendance in the workplace with respect to psychiatric disorders”
4 and that Plaintiff “may have difficulty completing a normal workday/workweek
5 without interruptions from his anxiety and depression/hypomania.” *Id.* (quoting
6 Tr. 478). The ALJ treated these “should” and “may” opinions as equivocal
7 opinions, unsupported by Dr. Dougherty’s findings or the other evidence of record.
8 *Id.*

9 Plaintiff claims the “ALJ commit[ed] reversible error by not incorporating
10 the limitations opined by . . . [Dr.] Dougherty” in the RFC. ECF No. 17 at 5. But
11 in neither the Motion, ECF No. 17, nor the Reply, ECF No. 23, did Plaintiff
12 provide analysis supporting this argument. Because Plaintiff failed to support this
13 issue with analysis, Plaintiff failed to challenge the ALJ’s findings as to Dr.
14 Dougherty. Therefore, any challenge is waived. *See Carmickle v. Comm’r, Soc.*
15 *Sec. Admin.*, 533 F.3d 1155, 1161 n.2 (9th Cir. 2008) (determining the court may
16 decline to address the merits of issues not argued with specificity); *Kim v. Kang*,
17 154 F.3d 996, 1000 (9th Cir. 1998) (ruling that the court will not consider on
18 appeal issues that are not argued “with any specificity” in the briefing).

1 However, because the case is being remanded on other grounds, the ALJ is
2 directed to consider Dr. Dougherty’s opinion in the course of considering the
3 medical evidence on remand.

4 c. DSHS Forms²

5 Plaintiff argues the ALJ failed to consider the “disabled” opinions of the
6 Washington State Department of Social and Health Services (DSHS) examiners.
7 ECF No. 17 at 13-14. The Commissioner concedes the ALJ erred by failing to
8 discuss the DSHS forms. ECF No. 22 at 11 (citing SSR 06-03p). Yet, the
9 Commissioner argues that no harm resulted from this error because these forms do
10 not provide any insight into Plaintiff’s ability to function. *Id.* (citing Tr. 285, 424).
11 However, the October 10, 2013 DSHS Medical Disability Decision states that
12 Plaintiff “cannot sustain 40 [hour week due to] current [symptoms of bipolar
13 affective disorder].” Tr. 424 (spelling out abbreviations used in original). Because
14
15

16 ² Plaintiff included this argument in a section challenging whether the ALJ
17 considered the functionally limiting effects of Plaintiff’s physical impairments.
18 ECF No. 17 at 12-13. However, Plaintiff’s DSHS-forms argument relates to his
19 mental impairments and therefore is analyzed under this “Mental-Impairment
20 Limitations” section.

1 the case is being remanded on other grounds, the ALJ is directed to consider the
2 DSHS disability opinions on remand.

3 2. *Physical-Impairment Limitations*

4 Plaintiff argues the ALJ erred by failing to consider the functional
5 limitations of his physical impairments. The ALJ must translate and incorporate
6 medical findings about Plaintiff's physical impairments into the RFC. *See Rounds*,
7 807 F.3d at 1006. The ALJ found that Plaintiff's cervical degenerative disc
8 disease, coronary artery disease and status post coronary infarction, and hepatitis C
9 were severe impairments. Tr. 22. In regard to Plaintiff's physical-impairment
10 limitations, the RFC states:

11 He can never climb ladders, ropes or scaffolds. He can occasionally
12 climb ramps and stairs. He can occasionally kneel and crouch. He
13 can occasionally stoop and crawl. He is limited to occasional
14 reaching at overhead height. He is limited to occasional exposure to
15 vibration and pulmonary irritants such as dust, fumes, odors, gases
16 and poor ventilation. He is limited to occasional exposure to
17 workplace hazards such as proximity to unprotected heights and
18 moving machinery.

19 Tr. 25.

20 Plaintiff contends this RFC is legally deficit because the record reflects that
he has knee and back issues that require him to be down for a couple weeks a year.
ECF No. 17 at 13-15. However, it is the role of the ALJ to resolve conflicts and
ambiguity in the evidence. *Morgan*, 169 F.3d at 599-600. If the ALJ's evaluation
and interpretation of the record is rational, the ALJ's conclusion will be upheld.

1 *Burch*, 400 F.3d at 679. Here, there was conflicting evidence as to Plaintiff’s knee
2 and back issues and resulting limitations. *See, e.g.*, Tr. 541 (June 18, 2010: lumbar
3 spine has tenderness, mild pain with motion); Tr. 293, 561 (August 2010: severe
4 degenerative disc disease with moderate severe spinal stenosis at C4-5, C5-6, and
5 C6-7); Tr. 539 (September 18, 2010: cervical and lumbar spine has tenderness and
6 moderate pain); Tr. 310, 535 (November 20, 2010: no thoracic or lumbar spine
7 tenderness. Normal mobility and curvature); Tr. 437 (August 21, 2012: cervical
8 spine has tender, mild pain with motion; no thoracic or lumbar spine tenderness,
9 with normal mobility and curvature); Tr. 528 (December 16, 2013: back and knee
10 pain opined as chronic problems); Tr. 514 (March 3, 2015: “[n]ormal gait. Able to
11 exercise normally”); Tr. 524 (May 15, 2015: “[n]egative” for “[b]ack pain, muscle
12 weakness and neck pain”); Tr. 570 (June 10, 2016: back pain and osteoarthritis of
13 the knee); Tr. 66 (“My knee’s okay. I can walk around. I can take out the
14 garbage. . . . I take my dog to the park.”). The ALJ rationally incorporated the
15 conflicted medical findings about Plaintiff’s physical impairments into the RFC.
16 The Court will not disturb the ALJ’s RFC in regard to Plaintiff’s physical
17 impairments. *See Hill*, 698 F.3d at 1158.

1 **B. Plaintiff's Symptom Claims**

2 Plaintiff contends the ALJ improperly evaluated his symptom claims. ECF
3 No. 17 at 10-12.

4 An ALJ engages in a two-step analysis to determine whether to discount a
5 claimant's testimony regarding subjective symptoms.³ SSR 16-3p, 2016 WL
6 1119029, at *2. "First, the ALJ must determine whether there is objective medical
7 evidence of an underlying impairment which could reasonably be expected to
8 produce the pain or other symptoms alleged." *Molina*, 674 F.3d at 1112 (quotation
9 marks omitted). "The claimant is not required to show that [his] impairment could
10 reasonably be expected to cause the severity of the symptom [he] has alleged; [he]
11 need only show that it could reasonably have caused some degree of the
12 symptom." *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009).

13 _____
14 ³ At the time of the ALJ's decision in July 2016, the regulation that governed the
15 evaluation of symptom claims was SSR 16-3p, which superseded SSR 96-7p
16 effective March 24, 2016. SSR 16-3p; Titles II and XVI: Evaluation of Symptoms
17 in Disability Claims, 81 Fed. Reg. 15776, 15776 (Mar. 24, 2016). The ALJ's
18 decision did not cite SSR 16-3p, but cited SSR 96-4p, which was rescinded
19 effective June 14, 2018 in favor of the more comprehensive SSR 16-3p. Neither
20 party argued any error in this regard.

1 Second, “[i]f the claimant meets the first test and there is no evidence of
2 malingering, the ALJ can only reject the claimant’s testimony about the severity of
3 the symptoms if [the ALJ] gives ‘specific, clear and convincing reasons’ for the
4 rejection.” *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (citations
5 omitted). General findings are insufficient; rather, the ALJ must identify what
6 symptom claims are being discounted and what evidence undermines these claims.
7 *Id.* (quoting *Lester*, 81 F.3d at 834); *Thomas v. Barnhart*, 278 F.3d 947, 958 (9th
8 Cir. 2002) (requiring the ALJ to sufficiently explain why it discounted claimant’s
9 symptom claims). “The clear and convincing [evidence] standard is the most
10 demanding required in Social Security cases.” *Garrison*, 759 F.3d at 1015
11 (quoting *Moore v. Comm’r of Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002)).

12 Factors to be considered in evaluating the intensity, persistence, and limiting
13 effects of an individual’s symptoms include: 1) daily activities; 2) the location,
14 duration, frequency, and intensity of pain or other symptoms; 3) factors that
15 precipitate and aggravate the symptoms; 4) the type, dosage, effectiveness, and
16 side effects of any medication an individual takes or has taken to alleviate pain or
17 other symptoms; 5) treatment, other than medication, an individual receives or has
18 received for relief of pain or other symptoms; 6) any measures other than treatment
19 an individual uses or has used to relieve pain or other symptoms; and 7) any other
20 factors concerning an individual’s functional limitations and restrictions due to

1 pain or other symptoms. SSR 16-3p, 2016 WL 1119029, at *7; 20 C.F.R. §
2 416.929 (c) (1)–(3). The ALJ is instructed to “consider all of the evidence in an
3 individual’s record,” “to determine how symptoms limit ability to perform work-
4 related activities.” SSR 16-3p, 2016 WL 1119029, at *2.

5 At step one of the analysis, the ALJ determined that Plaintiff’s medically
6 determinable impairments could reasonably be expected to cause some of the
7 alleged symptoms. Tr. 26. At step two, the ALJ discounted Plaintiff’s claims
8 concerning the intensity, persistence, and limiting effects of the symptoms of the
9 impairments as not consistent with medical evidence and other evidence in the
10 record. Tr. 26-27.

11 Here, Plaintiff largely failed to challenge the ALJ’s evaluation of his
12 symptom testimony and thus, any challenges are waived and the Court may decline
13 to review them. *See Carmickle*, 533 F.3d at 1161 n.2 (9th Cir. 2008) (determining
14 Court may decline to address on the merits issues not argued with specificity); *Kim*
15 *v. Kang*, 154 F.3d 996, 1000 (9th Cir. 1998) (the Court may not consider on appeal
16 issues not “specifically and distinctly argued” in the party’s opening brief).

17 *1. Objective Medical Evidence*

18 The ALJ found Plaintiff’s symptom claims about his physical and mental
19 impairments inconsistent with the medical evidence. Tr. 26-27. An ALJ may not
20 discredit a claimant’s symptom testimony and deny benefits solely because the

1 degree of the symptoms alleged is not supported by objective medical evidence.
2 *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001); *Bunnell v. Sullivan*, 947
3 F.2d 341, 346-47 (9th Cir. 1991); *Fair v. Bowen*, 885 F.2d 597, 601 (9th Cir.
4 1989). But medical evidence is a relevant factor in determining the severity of a
5 claimant's pain and its disabling effects. *Rollins*, 261 F.3d at 857; 20 C.F.R. §
6 416.929(c)(2).

7 a. Physical Impairments

8 As to Plaintiff's cardiac condition, the ALJ found that the medical evidence
9 does not support his claim of disabling limitations. Tr. 26. Specifically, the ALJ
10 noted that Plaintiff's cardiac functioning improved within a year-and-a-half of the
11 stent placement in October 2013. Tr. 26. The objective medical evidence supports
12 the ALJ's finding. *See, e.g.*, Tr. 350, 383, 399, 459, 469; Tr. 395 (noting that post-
13 surgery Plaintiff has "regular [cardiac] rhythm and no murmur" and that he is
14 "currently symptom-free"); Tr. 514 (February 17, 2015: "[n]ormal heart sounds
15 without gallop murmur or extra heart sounds); Tr. 506 (March 18, 2015: imaging
16 and ejection-fraction testing showed normal results).

17 As to Plaintiff's back and knee conditions, the ALJ found that Plaintiff's
18 symptom claims were inconsistent with the medical evidence. Tr. 27. As
19 discussed above, there was conflicting evidence in the record as to Plaintiff's knee
20 and back issues and any resulting limitations. *See, e.g.*, Tr. 66, 293, 310, 437, 514,

1 524, 535, 539, 541, 561, 570. The ALJ’s decision that Plaintiff’s back and knee
2 conditions were not as disabling as Plaintiff claimed is a rational interpretation of
3 the evidence and is supported by substantial evidence.⁴ *See Tommasetti v. Astrue*,
4 533 F.3d 1035, 1038 (9th Cir. 2008) (“[W]hen the evidence is susceptible to more
5 than one rational interpretation,” the court upholds the ALJ’s decision.).

6 Though Plaintiff’s symptom claims cannot be rejected on the sole ground
7 that they are not fully corroborated by objective medical evidence, the medical
8 evidence was a relevant factor for the ALJ to consider. Here, the ALJ’s decision is
9 supported by substantial evidence and was unchallenged. *See Carmickle*, 533 F.3d
10 at 1161 n.2.

11 b. Mental Impairments

12 As to Plaintiff’s mental impairments, the ALJ noted that Plaintiff’s
13 allegations of disabling impairments are inconsistent with the benign examination
14

15 ⁴ The Commissioner argues that Plaintiff waived this argument. ECF No. 22 at 8.
16 However, Plaintiff challenged the ALJ’s evaluation of the medical evidence. ECF
17 No. 17 at 12 (“As . . . the medical opinions show that [Plaintiff’s] symptoms are
18 supported by the objective evidence alone the ALJ’s attack on [Plaintiff’s]
19 symptoms is not supported and is [sic] constitutes reversible error.”).

1 findings. Tr. 26. First, the ALJ noted that the medical evidence reflects that
2 Plaintiff is alert and orientated. Tr. 26. There is substantial evidence in the record
3 to support the ALJ's finding that the medical records indicated that Plaintiff was
4 alert and orientated during the examinations. *See, e.g.*, Tr. 551 (December 7, 2010:
5 alert and orientated to person, place, and time); Tr. 565 (September 14, 2012: alert
6 and orientated to time, place, and person, with normal mood and affect); Tr. 335,
7 337 (September 19, 2013: alert and orientated to person, place, and time); Tr. 568
8 (September 24, 2013: orientated to person, place, and time with normal affect); Tr.
9 496 (September 3, 2015: orientated to person, place, and time); Tr. 580 (June 29,
10 2016: alert). Second, the ALJ concluded that Plaintiff's claims of disabling mental
11 health symptoms are inconsistent with the relatively normal examination findings.
12 Tr. 26. In support, the ALJ accurately summarized many of Dr. Dougherty's
13 clinical findings and observations, including that Plaintiff was neatly groomed,
14 appropriately dressed, cooperative, mildly anxious, oriented though frequently
15 tangential and/or circumstantial, aware of current events and the President, and was
16 able to recall three out of three objects after five minutes, recall six digits forward
17 and four digits in reverse, spell "world" correctly forward but not in reverse, follow
18 a basic conversation, adequately interpret traditional proverbs, and easily complete
19 a three-step command. Tr. 26 (citing Tr. 472-76).

1 2. *Improvement with Treatment*

2 The ALJ found that Plaintiff's cardiac functioning improved with treatment.
3 Tr. 26. The effectiveness of treatment is a relevant factor in determining the
4 severity of a claimant's symptoms. 20 C.F.R. § 416.929(c)(3) (2011); *see Warre v.*
5 *Comm'r of Soc. Sec. Admin.*, 439 F.3d 1001, 1006 (9th Cir. 2006) (recognizing that
6 conditions effectively controlled with medication are not disabling for purposes of
7 determining eligibility for benefits); *Tommasetti*, 533 F.3d at 1040 (determining
8 that a favorable response to treatment can undermine a claimant's complaints of
9 debilitating pain or other severe limitations). The ALJ found that Plaintiff's
10 cardiac functioning improved within a year-and-a-half of the stent placement in
11 October 2013. Tr. 26. The objective medical evidence supports the ALJ's finding.
12 *See, e.g.*, Tr. 350, 383, 399, 459, 469; Tr. 395 (noting that post-surgery Plaintiff
13 has "regular [cardiac] rhythm and no murmur" and that he is "currently symptom-
14 free"); Tr. 514 (February 17, 2015: "[n]ormal heart sounds without gallop murmur
15 or extra heart sounds); Tr. 506 (March 18, 2015: imaging and ejection-fraction
16 testing showed normal results). This was a clear and convincing and unchallenged
17 reason to find Plaintiff's symptom complaints not credible.

18 3. *Activities*

19 Next, the ALJ found Plaintiff's symptom claims inconsistent with his
20 activities. Tr. 27. A claimant's reported activities can be evaluated for consistency

1 with reported symptoms. *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007).

2 “While a claimant need not vegetate in a dark room in order to be eligible for

3 benefits, the ALJ may discredit a claimant’s testimony when the claimant reports

4 participation in . . . activities that “contradict claims of a totally debilitating

5 impairment.” *Molina*, 674 F.3d at 1112-13 (internal citations omitted). The ALJ

6 found that Plaintiff testified that he is in constant, severe pain, primarily from

7 degenerative disc disease. Tr. 26. The ALJ found this inconsistent with his

8 increased outdoor activities, including bicycling, cleaning out his shed, and

9 breaking up a dog fight. Tr. 27. As to the latter two activities, there is no

10 supporting evidence in the record that Plaintiff routinely cleans out his shed and

11 breaks up dog fights—the record reflects that these were one-time activities. Tr.

12 61, 71, 572 (cleaning out shed); Tr. 73 (breaking up fight between his dog and the

13 neighbor’s dog). As to bicycling, there is substantial evidence in the record that

14 Plaintiff’s bicycling is inconsistent with his claim that he is in constant severe pain

15 from degenerative disc disease. *See, e.g.*, Tr. 57 (riding bicycle around the trailer

16 park); Tr. 506 (noting that Plaintiff is “starting to do more biking now that the

17 weather is better”); *see also* Tr. 66, 476-77 (routinely takes dog to park); Tr. 476

18 (Plaintiff does his own laundry, cooks, sweeps, mops, and vacuums.). However,

19 given that the ALJ identified only one activity (bicycling) as inconsistent with

20 Plaintiff’s disability claims and Plaintiff does not bicycle on a daily basis, the

1 Court concludes this is an insufficient reason to find that Plaintiff's physical
2 activities were inconsistent with his physical-symptom claims. However, this error
3 is harmless as the ALJ listed additional reasons, supported by substantial evidence,
4 to discredit Plaintiff's symptom claims. *See Carmickle*, 533 F.3d at 1162-63;
5 *Molina*, 674 F.3d at 1115.

6 *4. Failure to Follow Medical Advice*

7 Finally, the ALJ discounted Plaintiff's symptom claims because he
8 knowingly engaged in conduct harmful to his health and contrary to medical
9 advice. Unexplained, or inadequately explained, failure to seek treatment or
10 follow a prescribed course of treatment may be the basis for an adverse credibility
11 finding unless there is a showing of a good reason for the failure. *Orn*, 495 F.3d at
12 638. Here, the ALJ discounted Plaintiff's symptom claims because he continues to
13 smoke approximately one-half to one pack of cigarettes daily even though he has a
14 known cardiac condition. Tr. 27 (citing Tr. 507 (March 18, 2015: one pack a day);
15 Tr. 495 (September 3, 2015: one-half pack a day)); *see also* Tr. 293-94 (August 10,
16 2010: physician encouraged Plaintiff to quit smoking in order to have surgery for
17 his cervical spinal stenosis). The ALJ's decision to discount Plaintiff's symptom
18 claims for failure to follow medical advice is a clear and convincing and
19 unchallenged reason supported by substantial evidence.

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1 4. Plaintiff may file an application for attorney fees by separate motion.

2 The District Court Executive is directed to file this Order, provide copies to
3 counsel, and **CLOSE THE FILE**.

4 DATED September 30, 2018.

5 s/Mary K. Dimke
6 MARY K. DIMKE
7 UNITED STATES MAGISTRATE JUDGE
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